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IN THE

Supreme Court of the United States

October Term, 1974

NO. 75-511

H. B. BUSTER HUGHES, INC.

VS.

OCEAN DRILLING AND EXPLORATION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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H. B. BUSTER HUGHES, INC.

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The petition of H. B. Buster Hughes, Inc., (Hughes) prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on May 7, 1975, and the rehearing denial entered on June 4, 1975.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. 11-31. There was no formal opinion of the District Court. Pertinent portions of the oral opinion are reproduced at Appendix B, pp. 32-34.

JURISDICTION

The judgment of the court below (Appendix A) was entered on the 7th day of May. A petition for rehearing

was denied on June 4, 1975 (Appendix C pp. 35-36) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Whether or not maritime law or land law applies to a contract of indemnity involving services of laborers and repairmen whose services are performed aboard a vessel.

(2) Whether or not a contract whereby a vessel owner is relieved of liability for his own negligence is against public policy.

(3) Whether or not as a matter of law a vessel owner may obtain a valid contract of indemnification for his own negligence from an individual or company whose economic power is far below that of the indemnitee.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

This case involving a question of jurisdiction and the application of federal maritime law to contracts for labor and services provided aboard a vessel (two vessels) Article 3 Section 2 of the United States Constitution and 28 U.S.C.A. Section 1333 both as set forth in Appendix D.

STATEMENT OF THE FACTS

As a result of the negligence of an employee of Ocean Drilling and Exploration Company (ODECO) a vessel known as a round barge overturned causing injuries to several individuals resulting in Jones Act suits filed by the various individuals against ODECO and by a claim by ODECO for indemnification for its own negligence under

a contract between ODECO and Hughes. Hughes is an oilfield contractor who is in the business of supplying labor and materials for use by the oil industry. ODECO is a multilateral corporation engaging in various aspects of oil drilling and exploration, handling and storage The individuals injured were supplied to ODECO by Hughes and were performing services for ODECO aboard the round barge. The indemnification agreement in question arises from a master service contract under which Hughes provided laborers and services to ODECO.

Hughes alleges in defense 1) the contention that the indemnity agreement indemnifying ODECO for its own negligence was void as against public policy and 2) the defense that the indemnification agreement should be invalidated as having been obtained by ODECO as a result of ODECO's superior bargaining power.

During the course of the trial Hughes entered into evidence testimony establishing the vast economic differences between ODECO and Hughes as well as evidence concerning the inability of Hughes as a labor contractor to obtain work without first agreeing to provide indemnity to the oil companies. (See Appendix E)

Although the testimony clearly established that Hughes had a total economic net worth far less than the value of the round barge in question which round barge was only one of a fleet of various vessels owned by ODECO the District Court ruled that there was no differences in economic bargaining power between Hughes and ODECO and thereby found that Hughes had not been overreached even though no testimony had been presented into the record to show that Hughes and ODECO had the same bargaining abilities and that Hughes could obtain work

without the necessity of granting indemnity to ODECO or to some other company similarly situated. No comment was made by the District Court as to the applicability of maritime law to the contract in question. The District Court merely concluded that an agreement to indemnify a vessel owner for his own negligence was not against public policy.

On appeal to the Fifth Circuit Court of Appeals the same issues were raised at which time the Court of Appeals ruled that this contract between Hughes and ODECO was governed by Louisiana law not maritime law and further upheld the District Court's determination that there was no overreaching of Hughes by ODECO. In deciding that Louisiana law was applicable and not maritime law the Court referred Hughes to the earlier decision of the Fifth Circuit in *Dickerson v. Continental Oil Company*, 449 F.2d 1209, Certiorari denied by this Court 405 U.S. 934, 92 S.Ct.942, 30 L.Ed. 2d 809.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that this Court should grant the writ applied for in that the decision of the Fifth Circuit Court of Appeals directly conflicts with earlier decisions in the Fifth Circuit Court of Appeals, decisions of this Court concerning jurisdiction of matters maritime and decisions of this Court concerning indemnification agreements by vessel owners.

In *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 380 (1969) this Court determined that by virtue of 43 U.S.C. Section 1331, et seq., the law of the adjacent state would apply to incidents occurring aboard fixed platforms upon the outer continental shelf of the United States insofar as that law

was not inconsistent with federal law. However, as was pointed out by the Fifth Circuit Court of Appeals on Page 8 of its printed opinion (see Appendix A) the accident out of which the original suit for indemnity arose occurred aboard a vessel, located upon the navigable waters of the United States, causing injury to seamen. When the Court of Appeals considered Hughes' claim that this Court's decision in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85. 75 S.Ct. 629, 99 L.Ed. 911 and this Court's decision in *Dixilyn Drilling Company v. Crescent Towing & Salvage Company*, 342 U.S. 797, 83 S.Ct. 967, 11 L.Ed. 2d 78 were applicable to the indemnity agreement before the Court, the Fifth Circuit Court of Appeals rejected this contention finding that Louisiana law applied and cited an earlier Fifth Circuit decision in the case of *Dickerson v. Continental Oil Company*, 449 F.2d 1209, Certiorari denied 405 U.S. 934, 92 S.Ct. 942, 30 L.Ed.2d 809.

The *Dickerson* case is clearly inapplicable to the contract for indemnity presented to the Court. In *Dickerson* the accident which gave rise to the claim for indemnity under the contract occurred aboard a stationary platform in the Gulf of Mexico. For this reason the Court in the *Dickerson* case applied to Louisiana law by virtue of the Outer Continental Shelf Land Act, 43 U.S.C.A. Section 1331 et seq. In doing so the Fifth Circuit completely ignored the earlier part of its decision wherein the Court determined that the accident was maritime in nature having occurred aboard a vessel, located on the navigable waters of the United States and causing injury to a seaman. It is respectfully submitted that there is an irreconcilable difference between these two portions of the Court of Appeals opinion as well as an irreconcilable difference between the decision and the earlier decisions of this Court.

As was noted by this Court in *Kossick v. United Fruit* Company, 365 U.S. 731, 81 S.Ct. 886 (1961) "The boundaries of admiralty jurisdiction over contracts — as opposed to torts or crimes — being conceptual rather than spatial, have always been difficult to draw. Precedent and usage are helpful insofar as they exclude or include certain common types of contract . . ." Generally a maritime contract is an agreement which concerns transportation by sea relates to navigation or maritime employment, or involves navigation and commerce on navigable waters (2 C.J.S. Admiralty Sec. 24, Note 23).

The master service contract which governed the relationship between Hughes and ODECO came into effect with the issuance of either oral or written work orders. The services which were provided under the purchase order and master service contract were for the services of a cook aboard the vessel and for maintenance and repair of the vessel known as the round barge. The contract which provides for repair of vessel is clearly maritime in nature, *Kossick v. United Fruit Co., Supra*, at page 890. Even if the Court were to consider the contract one for indemnity and therefore in the nature of insurance the contract remains one which is maritime in nature; *Kossick v. United Fruit Co.*, Supra.

Even if we do not consider the specific acts being performed by the injured parties, Hicks, Glover and Goforth, but rather the general nature of the contract, it should still be considered a maritime contract in that the indemnity being sought is indemnity for an accident which occurred to seamen, aboard a vessel, in navigation upon the navigable waters of the United States. (See the rationale of *In re: Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1934). Although the Fifth Circuit Court of

Appeals did refuse to apply that holding of this Court in *Bisso v. Inland Waterways Corporation* (Supra) it did note that if the *Bisso* case was a controlling precedent it would require a holding that the indemnity clause in the ODECO-Hughes contract was invalid. We respectfully submit that the Court of Appeals was correct in this observation but as we have noted incorrect in its failure to apply the *Bisso* case as ruling precedent.

After determining that the Bisso rule was inapplicable to the Hughes-ODECO contract this court in its original opinion went on to state that the Bisso rule would not be applied to the Hughes-ODECO situation because of the District Court's finding that "Buster Hughes was an experienced company of substantial size, itself. So I find as a matter of fact that there was no policy reason to hold the contract invalid because of the relative size of the companies or position in the market." Such rationale for not applying Bisso to the Hughes-Odeco contract is not logical.

If the Bisso rationale is applicable, the indemnity portion of the Hughes-Odeco contract is invalid as being against public policy. The Court cannot validate a contract which is invalid as against public policy by finding that the parties were of relatively equal size and had dealt at arms length. (See *Dixilyn Drilling Co. v. Crescent Towing & Salvage Co.*, 372 U. S. 697, 38 S.Ct. 967, 10 L.ed. 2d 78) Furthermore, the question of whether or not one of the parties had been overreached in making an indemnity contract is only part of the reasoning wherein the Supreme Court found in Bisso that this type of contract was against public policy. The first, and in all likelihood the primary reason, for application of the rule which allows vessel owners to take advantage of release from negligence contracts is "to discourage negligence by making wrong doers pay damages." (See Bisso at 349 U.S.91)

As is also noted by this Court in the Bisso case, the application of the rule pronounced by this Court in Bisso was ". . . merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release from negligence contracts in many relationships. . . ."

Finally, we respectfully submit that there was no evidence in the record of this matter upon which the District Court or the Court of Appeals could have determined that ODECO and Hughes were companies of relatively equal size and bargaining power. As noted above in Appendix E it is quite clear that the total net worth of Buster Hughes did not even exceed or even meet the value of the round barge involved in this accident. The record clearly establishes that the round barge was only one of many vessels, fixed production platforms, etc. owned by ODECO. In relation to ODECO Hughes could not be classified as anything more than the corner grocery store competing with the Great Atlantic and Pacific Tea Company.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition For Writ of Certiorari have been served on James Holmes, 1815 American Bank Bldg., New Orleans, La., Arthur F. Dumaine, 344 Camp St., New Orleans, La., John M. Lawrence, 2757 Tulane Ave., New Orleans, La., Salvadore E. Gutierrez, Jr., Suite 802, 344 Camp St., and A. Remy Fransen, Jr., 814 Carondelet St., New Orleans, La.

APPENDIX A

CLYDE E. HICKS,
Plaintiff-Appellee,

v.

OCEAN DRILLING AND EXPLORATION COMPANY,
Defendant-Third Party
Plaintiff-Appellant-Appellee,

H. B. BUSTER HUGHES, INC.,
Third Party Defendant-Appellant.

HESTER GOFORTH,
Plaintiff-Appellee,

v.

OCEAN DRILLING AND EXPLORATION CO., et al.,
Defendants-Appellants-Appellees,
H. B. BUSTER HUGHES, INC.,
Defendant-Appellant.

CHARLES NORMAN GLOVER,
Plaintiff-Appellee,

v.

OCEAN DRILLING EXPLORATION CO., et al.,
Defendants-Appellants-Appellees,
H. B. BUSTER HUGHES, INC.,
Defendant-Appellant.

No. 73-2169.

United States Court of Appeals, Fifth Circuit.

May 7, 1975.

Jones Act suits were brought against oil field contractor, which supplied labor crew for submersible oil storage facility, and against the facility owner by crew members who were injured when the facility, due to a removal of ballast, shook, tilted and refloated on its side. Two of the plaintiffs also sought recovery against owner on the basis of Louisiana Civil Code provision requiring one whose fault causes damage to another to repair it. The owner filed cross claims and a third-party action against labor supplier, seeking indemnity under master service contract. Upon consolidation of the actions, the United States District Court for the Eastern District of Louisiana, Jack M. Gordon, J., entered judgment in favor of plaintiffs against facility owner, but resolved the indemnity question in the owner's favor. Upon appeals by the owner and labor supplier, the Court of Appeals, Jones, Circuit Judge, held that (1) the oil storage facility was a vessel with provisions of Jones Act and general maritime jurisdiction, (2) the finding that plaintiffs were borrowed employees of the owner was supported by the evidence, (3) the accident fell within the scope of the indemnity contract's language, (4) a clause purporting to indemnify a vessel owner against its own negligence is not against Louisiana public policy, and (5) indemnitor's obligation, under contract, to secure $500,000 liability insurance coverage was not impliedly reduced to $300,000 by the fact that the indemnitor only secured the lesser amount, and no amendment of the contract was effected by the introduction of the contract in evidence with attached certificate showing coverage of only $300,000.

Affirmed.

1. *Seamen* 29(2)

Purpose for which facility was constructed and business in which it is engaged are the controlling considerations

in determining whether or not the facility is a "vessel" for Jones Act jurisdictional purposes. Jones Act, 46 U.S.C.A. § 688.

See publication Words and Phrases for other judicial constructions and definitions.

2. *Admiralty* 6
Seamen 29(2)

Drilling barges or platforms are "vessels" for Jones Act jurisdictional purposes. Jones Act, 46 U.S.C.A. § 688.

3. *Seamen* 29(2)

Submersible oil storage facility used in connection with offshore drilling was a "vessel" within provisions of Jones Act and general maritime jurisdiction, even though the facility had no motive power in itself. Jones Act, 46 U.S.C.A. § 688.

4. *Seamen* 29(5.14)

In Jones Act suit brought against oil field contractor, which supplied labor crew to owner of submersible oil storage facility, and against owner of the facility by crew members who were injured when the facility, due to removal of ballast, shook, tilted and refloated on its side, the jury finding that plaintiffs were borrowed employees of the facility owner was supported by the evidence.

5. *Indemnity* 8(2)

Accident which occurred when, due to a removal of ballast, submersible oil storage facility shook, tilted and refloated on its side came within scope of agreement wherein supplier of labor for the facility agreed to indemnify the facility owner for claims for damages "incident to, arising out of, in connection with, or resulting from the activities

of subcontractor * * * or in connection with the work to be performed, services to be rendered, or material to be furnished, under this contract."

6. *Master and Servant* 5

Master service contract between owner of submersible oil storage facility and supplier of labor therefor governed and controlled all work by supplier's crew, despite facility owner's claim that the contract applied only in situations where supplier was performing work as an independent contractor, since the contract provisions made it clear that, as between the parties, the supplier was an independent contractor at all times.

7. *Evidence* 455

District court properly refused to admit testimony as to the meaning of "master service contract" between owner of submersible oil storage facility and supplier of a labor crew therefor, where the contract was clear and unambiguous.

8. *Indemnity* 3

Supplier of labor for submersible oil storage facility on which an accident occurred could not avoid indemnity provisions of master service contract between it and facility owner on theory that there was no bargaining or discussion on any contract terms, since one who signs a contract presumptively knows its contents and cannot subsequently avoid its obligations by pleading ignorance.

9. *Contract* 93(2), 99(1)

Party who signs a written instrument or places his mark or allows his mark to be placed thereon is presumed to know its contents, and he cannot avoid the obligations which may be imposed on him by the instrument merely

upon a showing that he did not read it, or did not have it read and explained to him, or did not understand its provisions.

10. *Indemnity* 3

Clause in contract which purported to indemnify vessel owner against its own negligence was not against Louisiana public policy and void.

11. *Insurance* 104(3)

Indemnitor's obligation, under contract, to secure $500,000 liability insurance coverage was not impliedly reduced to $300,000 by the fact that the indemnitor only secured the lesser amount, and no amendment of the contract was effected by the introduction of the contract in evidence with attached certificate showing coverage of only $300,000.

12. *Contracts* 275

No principle of contract amendment, waiver or estoppel relieves a party from a contractual undertaking by the doing of something less than the agreement requires, in the absence of something done by the party to whom the duty is owned.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JONES, THORNBERRY and COLEMAN, Circuit Judges.

JONES, Circuit Judge:

A New Orleans shipbuilder, Higgins, Inc., constructed at its shipyard on the Industrial Canal in the city, for

Ocean Drilling and Exploration Company, herein called ODECO, a submersible oil storage facility which became known as the Round Barge. This facility is made up of a superstructure two hundred feet in length and fifty-four feet in width constructed approximately forty feet above cylindrical storage tanks fourteen and one-half feet in diameter. Two of the tanks run the entire length of the superstructure. These are connected to four storage tanks evenly spaced and running the width of the superstructure. This rectangular assemblage of tanks forms the lower structure of the Round Barge. There is a continuous fin or skirt five feet in height around the entire under side of the cylindrical storage tanks, specifically designed to sink the structure in a vertical position in the mud floor of the Gulf of Mexico and to hold the facility in a stationary position. The fin was attached to the outer tanks.

The Round Barge was towed from the shipyard where it was constructed to the site in the Gulf where it was then to be used. It was lowered by flooding the tank at one end of the Barge with water. When it had come to rest on the bottom, the tank on the other end was filled and it descended to the floor of the Gulf. In addition to the fin, about half of each of the tanks sank into the mud or silt on the bottom of the Gulf. The two tanks across the end of the Round Barge usually contained water ballast. Sometimes other tanks contained water but those were more often used for the storage of oil. Rock ballast was also used to keep the facility at the bottom of the Gulf.

The Round Barge was attached to a header platform constructed on conventional pilings. Pipelines from producing wells were connected to the header platform, which was conneteed to the Round Barge by Flowlines and a catwalk. By this method oil reached the storage tanks. The

facility was equipped with a galley and quarters for the crew.

Although ODECO claimed, at the trial, that the Round Barge was designed for the place where it was located, it was designed and constructed so that it could be raised for scraping and repair, and could be moved to another site for storage of oil. Consideration had been given to moving it to a different location in the Gulf. The refloating of a facility would be accomplished by disconnecting the catwalk, flowlines and the like from the header platform and then reversing the installation process by pumping out the water ballast, causing the structure to float.

H. B. Buster Hughes, Inc., one of the appellants, is an oilfield contractor. It supplied a labor crew to ODECO for the Round Barge under a master service contract. Clyde E. Hicks, Charles Norman Glover and Hester Goforth, who were plaintiffs in the district court and are appellees in this Court, were members of the crew furnished by Hughes to ODECO. All of their work was done on the Round Barge or on other ODECO facilities. Glover was a cook's helper, Hicks was a roustabout and Goforth was a welder.

Hicks testified that he was paid and employed by Hughes. His immediate superior was a Hughes toolpusher named Shepherd. Hicks usually got his orders from Shepherd, or from Punch, a Hughes Supervisor or Superintendent. Shepherd and Punch received their orders from an ODECO Field Superintendent named Aucoin. When asked if he was permitted to refuse to do what Aucoin told him to do, Hicks stated that he was permitted to quit. He further testified that Shepherd and Punch helped with the work, rather than merely coming by to check on him from time to time.

Goforth testified that he was employed and paid by Hughes. Goforth said that he usually got his orders from Aucoin, even though Punch was present. He was asked if this was not "just because he knew you", and gave the ambiguous response that "yes sir, because I had worked with him so long and for what reason, I couldn't answer that." Goforth related that on one occasion Aucoin had discharged an employee who was on the Hughes payroll. He stated that Aucoin had sometimes countermanded orders given by Punch. Goforth never asked Punch whether he should take orders from anyone else because he knew that Aucoin was "strictly boss over the whole works."

Glover took his instructions directly from a cook who was an ODECO employee.

On the night of April 25, 1971, Larry Braud, the head gauger on the Round Barge and an employee of ODECO, had pumped oil from storage tanks into a tanker. This operation was completed at about 3 a.m. Braud, pursuant to instructions from an ODECO supervisor, put into operation the pumps for removing the salt water ballast from the center line tanks.

About six[1] in the morning of April 26, 1971, the incident occurred from which this litigation arose. Glover had been working. Hicks and Goforth were earning time. The removal of the ballast caused the Round Barge to shake, tilt and to refloat on one side.

Hicks, Goforth and Glover were injured. They brought separate actions under the Jones Act[2] against ODECO. Each alleged the unseaworthiness of the platform and

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[1] Goforth fixes the time at 6:05.
[2] 46 U.S.C.A. § 688.

asserted Maritime Tort claims against ODECO as separate causes of action. Goforth and Glover named H. B. Buster Hughes, Inc. as an original defendant to their Jones Act claims and also sought recovery against ODECO on the basis of Article 2315 of the Louisiana Civil Code which requires one whose fault causes damage to another to repair it. ODECO filed cross claims and a third-party action against Hughes seeking indemnity under the service contract. The three actions were consolidated and tried before a jury. ODECO's indemnity claims against Hughes were reserved for decision by the district judge. Considerable testimony was taken at the trial of the consolidated actions. Much of it was directed to the issues of whether the Round Barge was a vessel and whether the plaintiffs were borrowed servants of ODECO.

At the conclusions of the testimony before the jury, Goforth and Glover dismissed their claims against Hughes.

In addition to giving the conventional jury instructions on burden of proof, negligence, causation and damages, the court gave charges on the tests for determining, among other things, whether a structure or facility is a vessel, whether employees are borrowed servants, whether the plaintiffs were members of the crew of the Round Barge, and for ascertaining whether a vessel is or is not seaworthy.

As to the test for determining whether the Round Barge was a vessel the district court said:

"The primary meaning of the term "vessel," is any water craft or other contrivance used or capable of being used as a means of transportation on water. The term "vessel," may also include, however, various special pur-

pose crafts, such as barges or dredges, which do not operate as a vessel for transportation, but, rather serve as moveable floating bases that may be submerged, so as to rest on the bottom and be used for stationary operations, such as drilling or dredging. Now, although mere flotation may not in and of itself be sufficient to make a structure a vessel, if a structure is buoyant and capable of being floated from one location to another, it may be found to be a vessel, even though it may have remained in one place for a long time and even though there are no plans to move it in the foreseeable future. Now, in considering whether a special purpose craft is a vessel, the determinative factors are the purposes for which the craft was constructed and the business, in which it is engaged. That is, was the craft designed for and used in navigation or commerce? A craft not designed for navigation and commerce, however, may be classified as a vessel, if at the time of accident, it had actually been engaged in navigation or commerce. Now in considering whether a special purpose craft is a vessel, the manner, in which a party or parties may have referred to or denominated such craft in contracts or other documents is not necessarily determinative of its status as a vessel, but is simply a factor for you to consider along with all the other evidence."

The borrowed servant doctrine, as here applicable, was thus stated by the district court in its charge to the jury:

"Now, the various criteria have been considered in determining when the doctrine of borrowed servant is applicable. While no one of these factors or any combination of them is decisive and no fixed test is used to determine the existence of a borrowed servant relationship, certain guidelines have been given great weight. The most universally accepted standard for determin-

ing whether a person is a borrowed servant is to ascertain who controls him in that employment and who has the power and the right to control and direct him in the performance of his work. In order to establish that the employee is the borrowed servant of another, the plaintiffs may establish, among other possible elements of proof, that the borrowing employer exercises control over the employee and has the right to control him. They may establish that the general employer has relinquished the right to control. They may establish that the borrowing employer has assumed the obligation for the payment of the employee's wages. They may establish that the employee is performing work for the borrowing employer and in the latter's business. They may establish that the temporary or borrowing employer has furnished the necessary instrument and the place of performance for the work in question. Now, although a formal agreement between the employers, that is ODECO and H. B. "Buster" Hughes, Incorporated, is not indispensible, the existence or non-existence of such an agreement should be considered. In considering whether the power exists to control and direct an employee, a careful distinction must be made between authoritative action and control on the one hand and mere suggestions as to detail or necessary cooperation, where the work furnished is part of a larger undertaking. On the other hand, cooperation as distinguished from subordination is not enough to create the employment relationship necessary to activate the borrowed servant doctrine."

The court told the jury that if it found that the Round Barge was a vessel and that the plaintiffs were members of the crew of the vessel or performed functions traditionally performed by seamen it would become necessary to

determine whether the Round Barge was unseaworthy in one or more respects. If it was manned by an incompetent crew at the time of the accident, or was improperly equipped by the lack of safety devices it could be found unseaworthy, and if unseaworthiness be found, it must also be found that it was a proximate cause of the injuries.

None of these jury instructions were challenged by the defendants. In response to specific interrogatories the jury found that the plaintiffs were borrowed servants of ODECO, that they were members of the crew of the Round Barge, that the Round Barge was a vessel, that ODECO was negligent, that its negligence was a cause of or contributed to the plaintiff's injuries, that plaintiffs were members of the crew or performed work on the Round Barge which work is traditionally performed by seamen, that the Round Barge was unseaworthy, that the unseaworthiness of the Round Barge was a proximate cause of plaintiffs' injuries, and that ODECO's negligence was the proximate cause of the plaintiff's injuries.

The jury returned a verdict against ODECO for Hicks in the amount of $177,000, in favor of Goforth for $212,000 and in favor of Glover for $90,000.

Following the jury trial on the issues of liability and damages the court, without a jury, tried the indemnity claim of ODECO against Hughes. The cause of action was based upon the indemnity provisions of a Master Service Contract between ODECO and Hughes. In this instrument ODECO is referred to as "Drilling Contractor" and Hughes is designated as "Subcontractor."

The indemnity provision reads,

"Subcontractor agrees to indemnify and hold harm-

less Drilling Contractor from and against any and all liens and claims for labor or material, and against any and all claims, demands, or suits for damages to persons and/or property (including, but not limited to claims, demands, or suits for bodily injury, illness, disease, death, loss of services, maintenance, cure, property or wages), which may be brought against Drilling Contractor (including, but not limited to those brought by Subcontractor's employees and agents and the agents and employees of its subcontractors) incident to, arising out of, in connection with, or resulting from the activities of Subcontractor, its employees and agents, or its subcontractors and their employees and agents, or in connection with the work to be performed, services to be rendered, or material to be furnished, under this contract, or under contracts referred to in 1(b) above, whether occasioned, brought about or caused in whole or in part by the negligence of Drilling Contractor, its agents, directors, officers, employees, servants or subcontractors, or otherwise, or by the unseaworthiness of any vessel owned, operated or controlled by Drilling Contractor, regardless of whether such negligence or unseaworthiness be active or passive, primary or secondary."

Attached to the Master Service Contract was a certificate of insurance which insured Hughes to the extent of $300,000 against its liability under the contract. The insurance policy was not incorporated in or referred to in the service contract.

The district court resolved the indemnity question for ODECO and against Hughes. Post-trial motions were denied, judgments for the several plaintiffs were rendered against ODECO for the amounts of the verdicts. Judg-

ment for the full amount of these recoveries was rendered in favor of ODECO and against Hughes. ODECO and Hughes have taken separate appeals.

ODECO, on this appeal, asserts that the finding of the jury that the Round Barge was a vessel was not supported by the evidence. It compares the Round Barge to a drydock and directs the court's attention to those precedents which hold that a dry dock is not a vessel for maritime jurisdiction. See Atkins v. Greenville Shipbuilding Corporation, 5th Cir. 1969, 411 F.2d 279, where it was held that flotation was not enough to constitute a structure a vessel. It was said that a drydock is not a vessel any more than is a wharf or warehouse when projecting into or upon the water. The distinction, as noted in the Atkins case, is the absence of the element of risk and the hazards of the sea. The Round Barge was not attached to the shore and had full exposure to the risks and hazards of the sea. The contention of ODECO is that the connection of the Round Barge to the header platform, which was constructed on conventional pilings, was the equivalent of the shore attachment of a drydock. The comparison is not well taken. The bottom of the Gulf is not shore and the catwalk and flowlines did not secure the one structure to the other. The Round Barge is not comparable to a stationary platform as ODECO suggests.

[1, 2] This court recently stated that the purpose for which a facility was constructed and the business in which it is engaged are the controlling considerations in determining whether or not the facility is a vessl. Cook v Belden Concrete Products, Inc., 5th Cir. 1973, 472 F.2d 999, cert. den., 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116 in that case a flat-deck barge which was moored alongside a concrete yard and used as a construction platform was held

as a matter of law not to be a vessel. The barge had no motive power of its own. It was submersible so as to permit launching of finished barges. Upon completion of a set of barges, the platform would be towed to deeper water for launching. It would sometimes be moved to different positions along the dock to pick up materials. At the time of the injury which gave rise to the action the platform was secured to the dock by ropes. The district court granted summary judgment in favor of Belden, the employer. The issue on appeal was whether as a matter of law the platform was a vessel for purposes of maritime jurisdiction. The appellant cook attempted to distinguish the platform from a drydock because of the platform's limited movement. The court rejected this approach. It stated that permanence of fixation is not the criterion which governs the maritime status of floating drydocks and similar structures. The court stated that,

> "Conventional ships and barges as well as such unconventional craft as submersible drilling barges and floating dredges which are designed for navigation and commerce are vessels within general maritime and Jones Act jurisdiction and retain such status even while moored, dry-docked, or otherwise immobilized and secured to land." 472 F.2d 999, 1001.

The Round Barge of this case is very similar to a submersible drilling barge or platform, one of the unconventional craft referred to in the foregoing quotation. Such structures are vessels for Jones Act jurisdictional purposes.

A submersible drilling barge, like the Round Barge, has no motive power in itself but is capable of being moved through navigable water under tow. When in use for drilling for oil or gas the drilling barge rests, as does

the Round Barge, on the bottom of the Gulf. Like the Round Barge it has a galley and quarters for its crew. On occasions this Court has held that a submersible drilling barge is a vessel. Offshore Company v. Robison, 5th Cir. 1959, 266 F.2d 769; Producers Drilling Company v. Gray, 5th Cir. 1966, 361 F.2d 432. Both of the cited cases were for personal injuries sustained by an employee working on the structure while it was resting on the bottom of navigable waters. Both were Jones Act cases. In the Offshore case the court observed that the Jones Act had been extended to cover "Almost any structure that once floated or is capable of floating on navigable waters" and that the word "vessel" includes "special purpose structures not usually employed as a means of transport by water but designed to float in water . . ." 266 F.2d 769, 711, 779.

In the Producers case the court said,

> "It is well settled that a barge may be a vessel. . . ." Here we have a special purpose barge designed to serve as a mobile drilling platform. At the time of the accident, the barge was being used for that purpose. The barge is equipped for use in navigable waters, had traveled a considerable distance through such waters to its present site and was, at the time of the accident, located in a navigable canal." 361 F.2d 432, 437.

We only need to change "mobile drilling platform" to read "oil storage facility" and the language applies to the Round Barge.

[3] The evidence was more than adequate to support the jury's finding that the Round Barge was a vessel within the provisions of the Jones Act and the general maritime jurisdiction. It is not unlikely that a determination

could be made that the Round Barge was a vessel as a matter of law if such a ruling was appropriate.

[4] ODECO contends that the jury finding that Hicks, Goforth and Glover were borrowed employees of ODECO was not supported by the evidence. The evidence warranted the submission of employment status to the jury. The court's instruction, to which no exception was taken, fully and fairly stated the applicable law. Dugas v. Pelican Construction Company, Inc., 5th Cir. 1973, 481 F.2d 773, cert. den., 414 U.S. 1093, 94 S.Ct. 723, 38 L.Ed.2d 550; Ruiz v. Shell Oil Co., 5th Cir. 1969, 413 F.2d 310. ODECO's position is without sound basis.

The other contentions of ODECO have been considered. They need not be discussed. They are without merit.

[5] The district court granted indemnity in favor of ODECO against H. B. Buster Hughes, Inc., for the full amount of the judgments in favor of Hicks, Glover and Goforth. The court stated that the Master Service Contract between ODECO and Hughes was in effect, that it governed the relationship of ODECO and Hughes at the time of the accident, and paragraph 9 of the contract entitled ODECO to indemnity. Hughes contends that ODECO is not entitled to indemnity because the negligence was not, nor was the accident itself related in any way to the activities of Hughes as required by the indemnity paragraph. Hughes asserts that the accident arose out of activities exclusively under the control of ODECO, that there was no work of Hughes being performed at the time of the negligent acts or the occurrence of the accident, and that the accident did not occur at a place prescribed by work orders. The interpretation which Hughes urges is too narrow. Hughes agreed to indemnify ODECO for claims for

damages "incident to, arising out of, in connection with, or resulting from the activities of subcontractor . . . or in connection with the work to be performed, services to be rendered, or material to be furnished, under this contract. . . ." The accident within the scope of the quoted language.

[6] Hughes contends that the Master Service Contract Contract applies only in situations where Hughes is performing work as an independent contractor. Paragraph 13 of the contract is as follows:

> "Subcontractor shall be an independent contractor with respect to the performance of all work hereunder, and neither Subcontractor nor anyone employed by Subcontractor shall be deemed for any purpose to be the employee, agent, servant, or representative of Drilling Contractor in the performance of any work or service or part thereof in any manner dealt with hereunder. Drilling Contractor shall have no direction or control of the Subcontractor or its employees and agents except in the results to be obtained. The work contemplated herein shall meet the approval of Drilling Contractor and be subject to the general right of inspection for Drilling Contractor to secure the satisfactory completion thereof. The actual performance and superintendence of all work hereunder shall be by Subcontractor, but Drilling Contractor or its representatives shall have unlimited access to the operations to determine whether work is being performed by Subcontractor in accordance with all the provisions of this Contract and the work order."

[7] The district court rejected this contention as a "grossly erroneous interpretation of the contract" and construed paragraph 13 as establishing that, as between

Hughes and ODECO, Hughes was an independent contractor at all times. The court stated that the scope of the contract was set forth in paragraph 1(a), where it was provided that the contract should govern and control all work by Hughes. The district court deemed it unnecessary to determine whether Hughes was an independent contractor in relation to Hicks, Goforth and Glover. In support of its contention that evidence should have been admitted as to the interpretation of the contract, Hughes relies primarily upon Tidewater Oil Company v. Travelers Insurance Company, 5th Cir. 1972, 468 F.2d 985, and Warren Petroleum Corporation v. J. W. Green Contractors, 5th Cir. 1969, 417 F.2d 242. In each of the cited cases before us the provision is unambiguous. There is no need to look beyond the instrument to determine the intent of the parties. The district court was correct in refusing to admit testimony as to the meaning of the contract.

[8, 9] Hughes next asserts that the contract was invalid because there was no meeting of the minds. It says that there was no bargaining or discussion on any of the contract terms, that Hughes was given no opportunity to reject the indemnity provisions short of rejecting all work for ODECO, that the parties differ on their interpertation of the contract, and that there was no explanation of any of the contract terms. This contention can be disposed of by a brief statement of the Louisiana Court of Appeals which states the controlling rule in these terms:

> "A party who signs a written instrument, or who places his mark or allows his mark to be placed thereon, is presumed to know its contents, and he cannot avoid the obligations which may be imposed on him by that instrument merely upon a showing that he had not read

it, or that he had not had it read and explained to him, or that he did not understand its provisions." St. Landry Loan Co., Inc. v. Avie, La. App.1962, 147 So.2d 725, 727.

[10] Hughes urges that a clause in a contract which purports to indemnify a vessel owner against its own negligence is against public policy and void. The basis for its position is found in Bisso v. Inland Waterways Corporation, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911. If the Bisso case is a controlling precedent it would require a holding that the indemnity clause in the ODECO —Hughes contract was invalid. However, Bisso involved a towing contract governed by the maritime law. The indemnity clause in the contract before us is to be construed under the law of Louisiana, and being so construed it is not in violation of public policy. Dickerson v. Continental Oil Co., 5th Cir., 449 F.2d 1209, cert. den., 405 U.S. 934, 92 S.Ct. 942, 30 L.Ed.2d 809.

In Bisso v. Inland Waterways Corporation, supra, one of the reasons given for the rule there adopted was "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." 349 U.S. 85, 91, 75 S.Ct. 629, 633, 99 L.Ed. 911. Hughes would have such protection as this might give him. It is unnecessary to consider the reason for a rule which is inapplicable to a case under consideration, but if it were otherwise Hughes could not prevail. The district court stated, "Buster Hughes was an experienced company of substantial size, itself. So I find as a matter of fact that there was no policy reason to hold the contract invalid because of the relative size of the companies or position in the market." We accept this determination of the trial court.

[11, 12] The final contention of Hughes is that the recovery against it by ODECO, if any, should be limited to $300,000. The Master Service Contract provides, in part, that:

> "At any and all times during the term of this Agreement, Subcontractor agrees to carry insurance of the types and in the minimum amounts as follows:
>
> * * *
>
> "Comprehensive general liability insurance with minimum limits of $100,000.00 for injury to or death of any one person and $500,000.00 for any one accident and with minimum limits of $300,000.00 for property damage. Such insurance shall additionally cover the contractual liabilities and indemnities herein assumed by Subcontractor with minimum limits of $500,000.00."

Attached to the contract between ODECO and Hughes, when it was put in evidence by ODECO, was a certificate of insurance providing for $300,000 liability coverage. The liability of Hughes is no more than the amount of insurance required by the contract. Dickerson v. Continental Oil Company, supra. Hughes reasons that the certificate showing insurance of a lesser amount than provided in the contract, and the introduction of the contract in evidence with the certificate attached effected an amendment to the contract. We have not been referred to any principle of contract amendment, waiver or estoppel which relieves a party from a contractual undertaking by the doing of something less than the agreement requires in the absence of something done by the party to whom the duty is owed. ODECO is entitled to recover for the full amount of the judgments against it.

No reversible error has been shown. The judgments of the district court are Affirmed.

APPENDIX B

Neither law nor policy forbids the regular user of contract labor from requiring that, in the interest of certainty and uniformity, vicarious liability be on the supplier and the supplier fix his contract hiring rate accordingly and insure against it if he desires. Conversely, the parties may agree for vicarious liability to fall on the user. Insofar as the furnished workman is under traditional tests a borrowed servant, the allocation of ultimate responsibility can be in terms of indemnity or of the employee being treated as the servant of one party or the other." Obviously, the Fifth Circuit recognized the wish to eliminate the uncertainty that I have been referring to and as I say, I think the parties in this case did eliminate the uncertainty by Paragraph 9 of the agreement and Paragraph 13.

Now, with regard to the validity of the indemnity agreement, it has been contended by Buster Hughes for various reasons the indemnity agreement would be invalid. There has been suggestion in connection with the memorandum for summary judgment several weeks ago that the overwhelming economic power of ODECO was such that the Court should consider the clause invalid. I do not consider this to be the case. I consider particularly the fact that it was an insured risk; that it could be taken into account in fixing the rates. There was no requirement that Buster Hughes carry out any particular work, if it didn't wish to under the contract. Buster Hughes was an experienced company of substantial size, itself. So I find as a matter of fact that there was no policy reason to hold the contract invalid, because of the relative sizes of the companies or position in the market. With regard to the validity of Louisiana law of such an agreement, I feel that this is completely and adequately covered by a recent decision in Civil

Action 72-745, Section "C" of this Court entitled *Calvin Day versus Ocean Drilling and Exploration Company*, in which Judge Alvin Rubin thoroughly considered Louisiana law and concluded that there was nothing in the law to presumably involve an almost identical, if not identical contract to prevent the parties from fixing economic risks and hazardous enterprises as they have done in this contract, so without repeating Judge Rubin's ruling, I adopt it as my own. I independently reached the conclusion that it is a sound statement of the law of Louisiana and that it is applicable in this case. Thus, I find the indemnity agreements contained to be valid, the contract to be applicable to the work, and therefore, I order that judgment be entered in Civil Action No. 71-1928 in favor of Ocean Drilling and Exploration Company as third-party plaintiff against H. R. "Buster" Hughes, Incorporated as third-party defendant for the amount of judgment as awarded by the jury; that in case 71-2806 entitled Hester Goforth versus Ocean Drilling and Exploration Company and H.B. Buster Hughes, Inc., I find in favor of Ocean Drilling and Exploration Company as cross-complainant against H. B. "Buster" Hughes, Incorporated and order that judgment be entered for the amount the jury awarded to Hester Goforth and in Civil Action No. 71-2857 entitled Charles Norman Glover versus Ocean Drilling and Exploration Company and H. B. "Buster" Hughes, Incorporated, I find in favor of Ocean Drilling and Exploration Company as cross-claimant against H. B. "Buster" Hughes, Incorporated, and order that judgment be entered for the amount the jury as awarded to the plaintiff.

I deny any award in any other case for attorneys fees and order the judgment be entered accordingly.

Gentlemen, I might have omitted some minute item that I need to clean up—

MR. CHRISTOVICH: No, sir. As I understand it, demand for the attorneys fees is denied in those cases and demand for costs, as well, that's granted with respect to those three cases?

THE COURT: The costs will be awarded, but attorneys fees are denied.

MR. FRANCIPANE: If Your Honor please, are you going to enter written reasons?

THE COURT: No, Judgment will simply be incorporating the jury's verdict plus this. If you will recall at the

APPENDIX C

U.S. COURT OF APPEALS—FILED JUNE 4, 1975
Edward W. Wadsworth, Clerk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 73-2169

CLYDE E. HICKS, Plaintiff-Appellee,

v.

OCEAN DRILLING AND EXPLORATION COMPANY,
Defendant-Third Party Plaintiff-Appellant-Appellee,

H. B. BUSTER HUGHES, INC.,
Third Party Defendant-Appellant.

HESTER GOFORTH, Plaintiff-Appellee,

v.

OCEAN DRILLING AND EXPLORATION CO., et al.,
Defendants-Appellants-Appellees,

H. B. BUSTER HUGHES, INC.,
Defendant-Appellant.

CHARLES NORMAN GLOVER, Plaintiff-Appellee,

v.

OCEAN DRILLING EXPLORATION CO., et al.,
Defendants-Appellants-Appellees,

H. B. BUSTER HUGHES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(June 4, 1975)

Before JONES, THORNBERRY and COLEMAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX D

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.

APPENDIX E

(144)

A Yes.

Q By whom, if you know, was Larry Braud employed in April 1971?

A By ODECO.

Q Now, the value of this round barge, approximately—I'm talking about the construction of the round barge, itself, how much was that?

A Something short of a million dollars, I would guess.

Q And when the round barge was built, it was built at the shipyard and then it was launched and then other construction was performed after the launch. I want to find out when it was handed over to you folks, to ODECO.

Did it have on it not only the tanks and the basic platform, but, also the living quarters and the equipment and most of the machinery in a complete state when it was handed over to you?

A Yes.

Q Now, the purpose of the round barge is for the storage of oil and also, for the housing of crews, isn't that true?

A Yes, once it's on location, that's correct.

Q Now, this round barge, when it comes out of the

shipyard and after the equipment is all put on its and the

[83] 91 [84]

letter identified by the witness as signed by Darrell Kline as ODECO-14.

THE COURT:

How about the other document, do you want to offer it?

MR. HOLMES:

Yes, sir. We would offer the construction contract identified by the witness by his signature as ODECO-15. We ask leave of Court to make a copy of the contract, as this is the only copy we have.

THE COURT:

Any objection?

MR. FRANCIPANE:

No, sir.

THE COURT:

It's ordered that ODECO-14 and 15 be admitted into evidence with permission being granted to substitute a copy for the originals of each.

BY MR. FRANCIPANE:

Q Mr. Hughes, just a couple of questions. Do you know what H. B. "Buster" Hughes, Inc., is capitalized at, approximately?

A The net worth of H. B. "Buster" Hughes, Incorporated, at that time, was around $450,000.00.

Q Mr. Hughes, I'm going to ask you not to give me an

[42] 45 [43]

Q I ask you again to look at this and tell us what the date of that contract was, sir?

A October 8, 1970.

Q Was there a master service contract signed by Buster Hughes and ODECO prior to this one?

A I don't recall. I mean, I couldn't say for sure.

Q Could Buster Hughes have done any work for ODECO, had they not signed this agreement, so far as you know?

A I understood from Mr. Dagley that we would not be able to do any work, unless we signed the contract.

Q Did you confer with Mr. Dagley about that particular thing at the time the contract was signed?

A He had discussed with me prior to signing it, yes.

Q All right, sir. Now, have you read the contract, sir?

A Yes, sir.

Q Did you read it when it was signed?

MR. CHRISTOVICH:

We object, if Your Honor please on the basis of relevancy. As to whether or not this gentleman read the contract at the time it was signed, we have a stipulation that the vice-president of this company was authorized to

execute the contract and did execute the contract and now if this testimony is for the purpose of showing some sort of misconception on the part of some other officer of Buster Hughes, we

[102] 113 [103]

Q Do you know, sir, if ODECO could do any—pardon me.

Do you know if H. B. "Buster" Hughes, Inc., could do any work for ODECO without having signed one of these master service contracts?

A The best as I know—the best as I understand, I don't think we could, but I'm not a judge of that.

Q Now, I show you the contract again and ask you who signed the contract for ODECO?

A Aldon—I can't read the name.

Q Well, let me ask it this way: Was Mr. Aldon LaBorde present when you were there to sign this contract?

A No, sir.

Q Was this contract signed by ODECO at the time you signed it?

A I don't remember. It wasn't signed in my presence, but I don't remember whether it was signed prior to or not, but I know it wasn't signed while I was there.

Q If this is Mr. LaBorde's signature, did you have any

conversation with Mr. LaBorde as to the understandings and meanings of the language in the contract?

MR. HOLMES:

Your Honor, that's totally irrelevant.

THE WITNESS:

I never talked to Mr. LaBorde.

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MICHAEL RODAK, JR., CLERK

NO. 73-541

In the
Supreme Court of the United States

OCTOBER TERM, 1974

H. R. HUGHES, INC.,
Petitioner

versus

OCEAN DRILLING AND EXPLORATION COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF OCEAN DRILLING AND EXPLORATION COMPANY

CHRISTOVICH & KEARNEY

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 75-511

H. B. BUSTER HUGHES, INC.

Petitioner

versus

OCEAN DRILLING AND EXPLORATION COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF OCEAN DRILLING AND EXPLORATION COMPANY

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINION BELOW

The entire oral opinion of the District Court is reproduced at Appendix A, Page 8 .

ARGUMENT

The first question presented by H. B. Buster Hughes, (Hughes) is whether or not the master service contract

(Appendix B) Page 18 .) is a Louisiana contract or a maritime contract,and this quietly concedes that if the contract is a Louisiana contract, the judgment below is correct. *Dickerson v. Continental Oil Co.*, 449, F. 2d 1209 (5th Cir. 1971); *Day v. ODECO*, 353 F.Supp. 1350 (ED.La. - 1973). The Trial Court found as a matter of fact that the contract in question was a Louisiana contract and this judgment was approved by the Fifth Circuit Court of Appeals. Necessarily this Court would have to reverse this finding of fact in order to grant the writ.

The parties involved in this litigation are Ocean Drilling and Exploration Company (ODECO), a company engaged in the business of drilling for oil on land, and over water on stationary platforms as well as submersible type drilling rigs. Hughes is in the business of supplying labor to fit the needs of its customers, such as ODECO, and in this particular case supplied three such workers: a welder, a welder's helper, and a cook. Hughes is a Louisiana Corporation, ODECO's principle place of business is Louisiana. This contract was executed in New Orleans, Louisiana. The contract provides that all work done by Hughes for ODECO under work orders, written or oral, whether done on permanent platforms, vessels, or within the State of Louisiana, was to be covered by the contract. Such a contract is not maritime in nature, as its purpose is not maritime. Hughes would ask the Court to find it to be a maritime contract because under the particular circumstances of this case, a vessel was involved, though this was a highly contested issue in both the trial court and the appellate court. To make such a finding under the limited facts of this case would lead to absurd and inconsistent results. If this accident had occurred on a stationary plat-

form in the Gulf of Mexico, Louisiana law would apply under *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed. 2d 380 (1969). Also see *Day v. ODECO*, 353 F. Supp. 1350 (ED La. - 1973). This was an obvious consideration of the lower courts in determining this to be a Louisiana contract.

Assuming arguendo that the contract is maritime in nature, the ruling in *Bisso v. Inland Waterways Corp.*, 349 S. 85, 75 S.Ct. 629, 99 L.Ed. 911, is inapplicable for several reasons. First, the peculiar circumstances of *Bisso* involved a towing contract and not a service for work to be performed for a drilling company in connection with the overall purpose of exploring for oil. There are any number of cases specifically holding that indemnity agreements such as the master service contract are not against public policy under maritime or Louisiana law. *Jurisich v. United Gas Pipeline Co.*, 349 F. Supp. 1227 (E.D. - La. 1972); *Mills v. Fidelity & Casualty Co. of New York*, 226 F.Supp. 786 (W.D. La. 1964); aff. 338 F.2d 341 (5 Cir. 1964); *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, (5th Cir. 1960); also see *United States v. Seckinger*, 408 F.2d 146 (5 Cir. 1969) reversed on other grounds; *Dickerson v. Continental Oil Co.*, 449 F.2d 1209 (5 Cir. 1971); *Transcontinental Gas Line L. Corp. v. Mobile Drill. Barge*, 424 F. 2d 684 (5 Cir. 1970); *Lanasse v. Travelers Ins. Co.*, 450 F. 2d 580 (5 Cir. 1971); *Elephant, Inc. v. Hartford Accident and Indemnity Co.*, 239 S.2d 692 (CA1 La. - 1970).

Furthermore, *Bisso* by its facts is limited to towing contracts and then, only where the relative positions of the parties make fair bargaining impossible. The trial court and

the court of appeal both held as a matter of fact that in the instant case there was no reason to invalidate the contract because of the relative size of the companies or their positions in the market. But whether the contract was non-maritime in nature is of no moment to the decision correctly established below. In *Grigsby v. Coastal Marine Services of Texas, Inc.*, 412 F.2d 1011, (5th Cir. 1960), involving an accident aboard a submersible drilling rig, Judge Brown pointed out that even if the contract were maritime in nature the principles of Louisiana law should apply:

> Probably at this point the admiralty Judge must forsake his amphibious woolsack, *Guillot v. Cenac Towing Co.*, 5th Cir.,1966, 366 F.2d,898 1966 A.M.C. 2685; *Compania Anonima Venozolana Di Navegacion v. A. J. Perez Export Co.*, 5th Cir., 1962, 303 F.2d 692, 1962 A.M.C. 1710 art. denied 371 U.S. 942, 835 Ct. 321, 9 L.Ed. 2d 276, and return to that less expansive function of Erie - seeking Louisiana law. The contract is not maritime and if it were, this aspect seems more like insurance and now much more latitude is left to the states even as to maritime insurance. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 1955, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337. Thus this Louisiana trained Judge was faced with the problem of Louisiana policy considerations on indemnity contracts indemnifying one against his own negligence. *Grigsby, supra*, p. 1038.

2.

Hughes has attempted to make the relative size of the parties an issue during the entire course of this litigation when in fact it is not. This was an insured risk insofar as Hughes was concerned. A premium was paid for the insurance policy required by the contract and the cost of same was charged back to ODECO as part of Hughes' operating overhead. See Appendix A, page 8 . Therefore any loss sustained was not the loss of Hughes, but of the underwriters.

In any event, the trial court found as a matter of fact that the relative size of the companies was not such as could invalidate the contract:

> "There has been suggestion in connection with the memorandum for summary judgment several weeks ago that the overwhelming economic power of ODECO was such that the Court should consider the clause invalid. I do not consider this to be the case. I consider particularly the fact that it was an insured risk; that it could be taken into account in fixing the rates. There was no requirement that Buster Hughes carry out any particular work, if it didn't wish to under the contract. Buster Hughes was an experienced company of substantial size, itself. So I find as a matter of fact that there was no policy reason to hold the contract invalid, because of the relative size of the companies or position in the market."

This was specifically approved by the Court of Appeals:

"The district court stated, 'Buster Hughes was an experienced company of substantial size, itself. So I find as a matter of fact that there was no policy reason to hold the contract invalid because of the relative size of the companies or position in the market.' We accept this determination of the trial court."

CONCLUSION

There are no new issues before this Honorable Court. Every issue presented herein, as well as numerous others, was carefully reviewed by the district court and approved by the Court of Appeals.

We respectfully submit that the factual findings of the lower court should not be disturbed and that the Writ of Certiorari filed herein by Hughes should be denied.

Respectfully submitted:

CHRISTOVICH & KEARNEY
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W. K. CHRISTOVICH

JAMES F. HOLMES

OF COUNSEL:
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Lemle, Kelleher, Kohlmeyer
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First National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari have been served on Arthur F. Dumaine, 344 Camp Street, New Orleans, La., John M. Lawrence, 2757 Tulane Ave., New Orleans, La., Salvadore E. Gutierrez, Jr., Suite 802, 344 Camp Street, A. Remy Fransen, Jr., 814 Carondelet Street, New Orleans, La., Kenneth L. Sanders, 3324 N. Causeway Blvd., Metairie, La., Chester Francipane, 3324 N. Causeway Blvd., Metairie, La., and Wayne H. Scheuermann, 3324 N. Causeway Blvd., Metairie, La., this 28 day of November, 1975.

JAMES F. HOLMES

APPENDIX A

Well, gentlemen, it's my custom and I made a deal with you that if you prepared the case adequately prior to trial I wouldn't make you wait for a decision.

In rendering an oral decision, one must always take into account the situation. Certain cases, which are novel, which lack precedent dictate issuance of a written decision. Other cases, which do not contain those factors and relate to well settled or reasonably well settle principles, which are primarily factual in nature, I feel best disposed of as expeditiously as possible while the facts and law are fresh on the Judge's mind. I feel that this case falls into that category, because of the fact that the parties previously have furnished me with proposed Findings and Conclusions and it makes it possible for me to determine the extent, to which they have either proved their case or disproved the proponent's case. I feel I am prepared to rule.

The crux of the issue between Ocean Drilling and Exploration Company, the third-party plaintiff and cross-claimant in these cases and H. B. "Buster" Hughes, Incorporated, it seems to me is whether the master service agreement entered into between those companies, dated October 8, 1970 was applicable to the particular activity, in which the employees of Buster Hughes, the plaintiffs in this action, were engaged when the injury took place, as a result of the unexpected accident on the round barge. Further, if it is applicable, the question is whether its provisions regarding indemnity are enforcable in view of all the facts and circumstances

and whether they apply to the judgment, which has been rendered against ODECO by virtue of previous action of the jury in these consolidated cases. I find that the contract entitled "Master Service Contract," dated October 8, 1970, was in effect, did govern the relationship between ODECO and Buster Hughes at the time of the accident and that Paragraph 9 of that contract entitles ODECO to indemnity from Buster Hughes for the amount of the judgment against him.

With regard to the first issue, that is, the applicability of the master service agreement, let me say without intending impertinence to any counsel involved, that it would take a person who is a great deal more addicted to sophistry than I to accept the proposition that this contract was in - applicable to the business activities then going on between ODECO and Buster Hughes. Indeed, both H. B. Buster Hughes and H. D. Hughes and all other witnesses appeared to have recognized, themselves, that the contract was applicable, but seemed to wish to ask the Court to draw some distinction between a situation, in which the relationship between Buster Hughes and ODECO was that of master-servant or that of independent contractor or some other situation, in which the independent contractor relationship had been vitiated. The contention by Buster Hughes contending that the contract only applies in a situation where Buster Hughes, in fact was acting as an independent contractor, I think this is a completely erroneous interpretation of the contract. The Court feels that the contract is perfectly clear and that as between Buster Hughes and ODECO, the intention was to provide that Buster Hughes would be an independent contractor at all times. This was provided in Paragraph 13. Now, no two parties can make their will in this regard binding on third

persons. Indeed, as we know, the law sets forth many tests in determining whether a relationship is actually that of Independent contractor or something else. These tests have to do with supervision and control, who provides tools, who provides payment, many, many other tests, none of which are decisive. The control test, as pointed out by counsel, isn't a very significant test, but these tests all relate to third parties. In other words, ODECO and Buster Hughes come under no circumstances by virtue of the agreement, regardless of what the terms of that agreement have made their will, with regard to a relationship binding on third-parties. If, indeed, the facts proved to the contrary, but as between themselves, they have agreed that their relationship would be that of contractor and independent contractor and it provided that Buster Hughes would be an independent contractor. This was the purpose of Paragraph 13.

Now, Buster Hughes has asked the Court to read Paragraph 13 as providing the scope of the contract by in effect, asking the Court to use Paragraph 13 as limiting the scope of the contract only to those situations, which Buster Hughes was actually an independent contractor vis-a-vis third parties. Well, I think this is a grossly erroneous interpretation of the contract. The scope of the contract is set forth in Paragraph 1(a) in clear terms, as governing and controlling all work of sub-contractor. That was the denomination of Buster Hughes for the drilling contractor under work order, oral or written, given on or after the date by the drilling contractor to sub-contractor. That's the scope of the contract. The fact that the parties subsequently deemed it advisable to agree amongst themselves that at all times Buster Hughes would be an independent contractor, in my opinion does not in any

way limit the scope of the work to those situations, in which that was the actual relationship. Thus, in this case I find it unnecessary to determine whether Buster Hughes' activities on the date of the occurrence were those of an independent contractor or not, insofar as relationship to the plaintiffs, its employees, because I think the very purpose of Paragraph 13 was to preclude the necessity of such determinations between Buster Hughes and ODECO; to eliminate the uncertainty that would exist in every case as to the contractual relationship between ODECO and Buster Hughes. Indeed, to give this contract any other interpretation would be a tremendous eye test. This would, in effect, be no contract relating to any of the business relationships between ODECO and Buster Hughes, until after there were a determination based upon many factual considerations of whether or not Buster Hughes was indeed an independent contractor or whether or not some other facts had occurred, which would have vitiated the independent contractor relationship.

Now, obviously, the parties could not have intelligently have made such a decision, so I find it immaterial to determine what the actual relationship was between ODECO and Buster Hughes on the date of the occurrence.

The Jury in this case against ODECO by the plaintiffs found that the plaintiffs were borrowed servants of ODECO. In making its decision that they were seamen for purposes of the Jones Act, the Court gave the jury interrogatories, I believe thirteen, to ascertain whether the Jones Act was applicable and whether plaintiffs were entitled to recover under other theories of recovery. I find it significant to note that the jury answered yes to every interrogatory, except the

one, which specifically they were told not to answer yes to, if they had answered another interrogatory yes. Thus, I conclude that the jury was primarily interested in seeing that the plaintiffs recover, without regard to the theory on which they recover. However, based on the Court's instructions as to the law of borrowed servant and based on the Court's understanding of the law of borrowed servant relationship, if I had been required and if I were required for purposes of this decision to make a determination as to the borrowed servant status of the employees, I would have decided in a fashion differently than the jury decided. I felt the evidence did show that there was indeed a rather close relationship between Buster Hughes' employees and ODECO representatives; that this was due primarily to friendship, long-time working relationships, but that at all times, the real control, the ability to hire and fire from employment by Buster Hughes, rested with Buster Hughes and that if Buster Hughes had wished to, under the terms of its contract, have exerted complete control, it could have insisted that the type of cooperation, which took place not take place. Obviously, it didn't do so, because it wouldn't have been common sense to do so in any relationship of the nature existing in the offshore. There must of necessity be cooperation. But Buster Hughes at all times had a superintendent or pusher on board the round barge. He was there in charge of the Buster Hughes men and the Court feels that under the tests applicable, the men would not have been borrowed servants. I reiterate that I state this only for the purposes of making complete findings. I do not find that it's necessary to reach this decision, because I find nothing in the contractual agreement between ODECO and Buster Hughes, which would have vitiated Hughes' obligation to indemnify ODECO. Even if

the employees had become borrowed servants, one must bear in mind the distinction between the rights of third parties in this case, the plaintiffs and the contractual relationship between these two parties involved in this matter, which I'm deciding, these two parties decided by Paragraph 13 of their agreement to eliminate uncertainty and to provide what their relationship would be and by Paragraph 9, they decided to shift the responsibility for all liability pertaining to employees of Buster Hughes to Buster Hughes. Moreover, by Paragraph 17 they agreed Buster Hughes would provide insurance to insure its contractual undertaking and the Court finds it significant to note that following it or extemporaneously with the agreement, the insurance agent Buster Hughes employed provided a very detailed statement to ODECO, in which after stating the limits of comprehensive liability, it went on to specifically state that it did cover contractual liability and further, that it covered a hold harmless agreement, if there were such a hold harmless agreement. So we have a situation here where it appears to the Court that Buster Hughes and its insurer held out to ODECO that they would insure and that they had insured the specific contractual undertaking. I find nothing in the law, which abrogates the right of Buster Hughes to assume this responsibility and to shift it from ODECO to itself as a matter of business risk and for Buster Hughes or for its insurer to have read this contract in such a limited fashion to have intended in any fashion that the indemnity agreement would only apply if a finder of fact in a particular case found that an independent contractor relationship existed, is in this Court's opinion a defiance of all common sense and imagination. I just cannot believe that sound experienced businessmen and insurers would have undertaken such a risk on such a stretched inter-

pretation of words.

Now, with regard to the application of the contract, the specific work, I have found, as I stated that the contract by its own terms specifically covered the work. I find this not only from the contract, but I find it, also from the testimony of both Mr. Hughes and Mr. Rodrigue and Mr. Dagley. Indeed, if this contract, as I say had not been the contract governing the relationship, there would have been no contract. Moreover, the evidence consisting of exhibits pertaining to work orders issued pursuant to the contract payments made thereunder further corroborate that it was intended by the parties that the work actually done at the time of the accident was within the scope of the master-servant contract.

Now,with regard to this question, the Court stated earlier that it did not feel that a written opinion was necessary, because it was not novel. I'm basing this statement primarily on the fact that the Fifth Circuit has recently decided the case of *Tidewater Oil Company versus Travelers Insurance Company*, in which Buster Hughes was the insured of Travelers, which appears to me to be almost on all fours with this and which the Fifth Circuit speaking through Judge Godbold reversed and sent the case back, because the District Court had attempted to discern some intention of the parties regarding the application of the contract, rather than reading the contract itself. The question in that case had to do with indemnity provisions of the contract and I find that the Fifth Circuit specifically took into account the very factors that I have just mentioned when it stated on Page 988 of 468 F.2d: "Tidewater, as a user of contract labor, requires workmen of various trades and varying skills to work under

widely differing levels of supervision and in numerous different physical situations. Traditional tests of employer-employee, independent contractor, and borrowed servant, if applied on a man-by-man, job-to-job basis, can produce wide variations and uncertainties regarding status. Neither law nor policy forbids the regular user of contract-labor from requiring that, in the interest of certainty and uniformity, vicarious liability be on the supplier and the supplier fix his contract hiring rate accordingly and insure against it if he desires. Conversely, the parties may agree for vicarious liability to fall on the user. Insofar as the furnished workmen is under traditional tests a borrowed servant, the allocation of ultimate responsibility can be in terms of indemnity or of the employee being treated as the servant of one party or the other." Obviously, the Fifth Circuit recognized the wish to eliminate the uncertainty that I have been referring to and as I say, I think the parties in this case did eliminate the uncertainty by Paragraph 9 of the agreement and Paragraph 13.

Now, with regard to the validity of the indemnity agreement, it has been contended by Buster Hughes for various reasons the indemnity agreement would be invalid. There has been suggestion in connection with the memorandum for summary judgment several weeks ago that the overwhelming economic power of ODECO was such that the Court should consider the clause invalid. I do not consider this to be the case. I consider particularly the fact that it was an insured risk; that it could be taken into account in fixing the rates. There was no requirement that Buster Hughes carry out any particular work, if it didn't wish to under the contract. Buster Hughes was an experienced company of substantial size,

itself. So I find as a matter of fact that there was no policy reason to hold the contract invalid, because of the relative sizes of the companies or position in the market. With regard to the validity of Louisiana law of such an agreement, I feel that this is completely and adequately covered by a recent decision in Civil Action 72-745, Section "C" of this Court entitled *Calvin Day versus Ocean Drilling and Exploration Company,* in which Judge Alvin Rubin thoroughly considered Louisiana law and concluded that there was nothing in the law to presumably involve an almost identical, if not identical contract to prevent the parties from fixing economic risks and hazardous enterprises as they have done in this contract, so without repeating Judge Rubin's ruling, I adopt it as my own. I independently reached the conclusion that it is a sound statement of the law of Louisiana and that it is applicable in this case. Thus, I find the indemnity agreements contained to be valid, the contract to be applicable to the work, and therefore, I order that judgment be entered in Civil Action No. 71-1928 in favor of Ocean Drilling and Exploration Company as third-party plaintiff against H. B. "Buster" Hughes, Incorporated as third-party defendant for the amount of judgment as awarded by the jury; that in case 71-2806 entitled Hester Goforth versus Ocean Drilling and Exploration Company and H.B. Buster Hughes, Inc., I find in favor of Ocean Drilling and Exploration Company as cross-complainant against H.B. "Buster" Hughes, Incorporated and order that judgment be entered for the amount the jury awarded to Hester Goforth and in Civil Action No. 71-2857 entitled Charles Norman Glover versus Ocean Drilling and Exploration Company and H.B. "Buster" Hughes, Incorporated, I find in favor of Ocean Drilling and Exploration Company as cross-claimant against H.B. "Buster" Hughes, Incorporated,

and order that judgment be entered for the amount the jury as awarded to the plaintiff.

I deny any award in any other case for attorneys fees and order the judgment be entered accordingly.

APPENDIX B

ODECO
Ocean Drilling & Exploration Company

MASTER SERVICE CONTRACT

THIS AGREEMENT made and entered into this 8 day of October, A.D. 1970, by and between OCEAN DILLING & EXPLORATION COMPANY, P.O. Box 61780, New Orleans Louisiana 70160, hereinafter called "Drilling Contractor", and H. B. "Buster" Hughes, Inc., P.O. Box 55, Harvey, Louisiana, hereinafter called "Subcontractor",

WITNESSETH THAT

WHEREAS, Drilling Contractor is engaged in the business of drilling exploratory and development wells seeking oil and gas or other minerals for itself or for the account of others; and,

WHEREAS, Drilling Contractor or other parties for whom or with whom Drilling Contractor is working may desire the services of Subcontractor; and

WHEREAS, Subcontractor represents that it has adequate equipment in good working order and fully trained personnel capable of efficiently operating such equipment and performing services in a safe, proper and workmanlike manner for Drilling Contractor or others as aforesaid;

NOW THEREFORE

In consideration of the mutual promises and covenants herein contained, the parties hereto mutually agree as follows:

1(a) This agreement shall control and govern the performance of all work by Subcontractor for Drilling Contractor under work orders, oral or written, given on or after the date hereof by Drilling Contractor to Subcontractor.

(b) With respect to any work performed by Subcontractor pursuant to contracts or work orders with parties other than Drilling Contractor on any drilling barges, vessels, platforms, installations or other property of any kind owned by, leased to, chartered to, or under the control of Drilling Contractor, Sections 8, 9, 10 and 11 of this contract shall be applicable as between Subcontractor and Drilling Contractor with respect to the work so performed.

(c) This agreement shall remain in effect until canceled by either party by giving the other party 30 days written notice to that effect at the respective addresses herein set forth; provided,however, that with respect to any work in progress as of the date of the cancellation, this agreement shall continue in effect until the work be completed.

(2) Upon the acceptance by Subcontractor of any work order for services and/or equipment, Subcontractor will furnish same at the time agreed upon, and continue operations diligently and without delay, in a safe, proper and workmanlike manner, in strict conformity with the specifications and requirements contained herein and in such work order, subject however, to paragraphs 3, 4 and 5 hereof.

(3) This Contract does not obligate Drilling Contractor to order work and/or equipment or materials from Subcontractor, nor does it obligate Subcontractor to accept such

orders, but it, together with any applicable work order, shall control and govern all work accepted by Subcontractor and shall define the rights and obligations of Drilling Contractor and Subcontractor, during the term hereof.

(4) Drilling Contractor and Subcontractor respectively agree to comply with all laws, rules and regulations, Federal, State and municipal, which are now or may become applicable to operations covered by this Agreement and any work order issued in connection herewith. If any of the terms hereof are in conflict with any applicable rule, regulation, order or law of a State or Federal Regulatory Body, the terms of this Contract so in conflict shall not apply and the applicable State or Federal rule, regulation, order or law shall prevail.

(5) Neither Drilling Contractor nor Subcontractor shall be liable to the other for any delays or damages or any failure to act due, occasioned, or caused by reason of Federal or State laws or the rules, regulations or orders of any public body or official purporting to exercise authority or control respecting the operations covered hereby, including the use of tools and equipment, or due,occasioned, or caused by strikes, action of the elements, or causes beyond the control of the parties affected hereby, and delays due to the above causes, or any of them, shall not be deemed to be a breach of or failure to perform under this Agreement.

(6) The Drilling Contractor shall pay Subcontractor for the work and/or equipment or materials furnished by Subcontractor at the rate stipulated in the work orders provided for herein, subject to same being accepted by Drilling Con-

tractor as fully complying with all the terms, conditions, specifications and requirements of this Contract and such work orders; provided, Subcontractor shall have satisfied Drilling Contractor that there are no liens or claims on or against Drilling Contractor or its property by reason of the operations of Subcontractor hereunder.

(7) Delivery tickets covering any materials or supplies furnished by vendors for which Drilling Contractor is obligated to reimburse Subcontractor, shall be turned in to Drilling Contractor as received. The quantity,description, and condition of materials and supplies so furnished shall be verified and checked by Subcontractor, and such delivery tickets shall be properly certified as to receipt by Subcontractor's representative.

(8) At any and all times during the term of this Agreement, Subcontractor agrees to carry insurance of the types and in the minimum amounts as follows:

(a) Workmen's compensation insurance in full compliance with all applicable State and Federal laws and regulations.

(b) Employers' liability insurance in the minimum limits of $100,000.00 per accident covering injury or death to any employee which may be outside the scope of the workmen's compensation statute of the state in which the work is performed.

(c) Comprehensive general liability insurance with minimum limits of $100,000.00 for injury to or death of any one person and $500,000.00 for any one accident and with minimum limits of $300,000.00 for property damage. Such insurance shall additionally cover the contractual liabilities and

indemnities herein assumed by Subcontractor with minimum limits of $500,000.00

(d) Automobile liability insurance covering owned, non-owned, and hired automotive equipment with minimum limits of $100,000.00 for injury to or death of any one person and $300,000.00 for any one accident and $100,000.00 property damage.

(Add Marine Insurance clause if required.)

(e)

(f) All such policies shall be carried in a company or companies acceptable to Drilling Contractor and shall be maintained in full force and effect during the term of this agreement and shall not be canceled, altered or amended without 10 days prior written notice having been furnished to Drilling Contractor. All policies of Subcontractor, whether specifically mentioned above or not, shall be endorsed to waive Subrogation against Drilling Contractor and against all parties for whom Drilling Contractor may be working, with the exception of Workman's Compensation insurance but including all insurance carried by Subcontractor protecting against loss of or damages to its property and equipment employed in the performance of any work order issued hereunder. Subcontractor agrees to furnish Drilling Contractor with a certificate or certificates evidencing insurance coverage in accordance with the above requirements and upon request to furnish Drilling Contractor certified copies of all such policies.

(9) Subcontractor agrees to indemnify and hold harmless Drilling Contractor from and against any and all liens and claims for labor or material, and against any and all claims, demands, or suits for damages to persons and/or property

(including, but not limited to claims, demands, or suits for bodily injury, illness,disease,death, loss of services,maintenance, cure, property or wages), which may be brought against Drilling Contractor (including, but not limited to those brought by Subcontractor's employees and agents and the agents and employees of its subcontractors) incident to, arising out of, in connection with, or resulting from the activities of Subcontractor, its employees and agents, or its subcontractors and their employees and agents, or in connection with the work to be performed, services to be rendered, or material to be furnished, under this contract, or under contracts referred to in 1(b) above, whether occasioned, brought about or caused in whole or in part by the negligence of Drilling Contractor, its agents, directors, officers, employees, servants or subcontractors, or otherwise, or by the unseaworthiness of any vessel owned, operated or controlled by Drilling Contractor, regardless of whether such negligence or unseaworthiness be active or passive, primary or secondary.

(10) Drilling Contractor shall not be liable for damage to or destruction of Subcontractor's surface equipment or materials even though such damage may be caused in whole or in part by the negligence of Drilling Contractor, its agents, directors, officers, employees, servants, subcontractors or otherwise or by the unseaworthiness of any vessel owned, operated or controlled by Drilling Contractor.

(11) Subcontractor shall report to Drilling Contractor as soon as practicable all accidents or occurrences resulting in injuries to Subcontractor's employees or third parties, or damage to property of third parties, arising out of or during the course of services for the Drilling Contractor or under

contracts referred to in paragraph 1(b) above by Subcontractor or of any sub-contractor of Subcontractor, and, when requested, shall furnish Drilling Contractor with a copy of reports made by Subcontractor to Subcontractor's insuror or to others of such accidents and occurrences, including statements or any other investigative material.

(12) Subcontractor agrees to pay all taxes, licenses, and fees levied or assessed on Subcontractor in connection with or incident to the performance of this Contract by any governmental agency and unemployment compensation insurance, old age benefits, social security, or any other taxes upon the wages of Subcontractor, its agents, employees, and representatives. Subcontractor agrees to require the same agreements and to be liable for any breach of such agreements by any of its sub-contractors. Subcontractor agrees to reimburse Drilling Contractor on demand for all such taxes or governmental charges, State or Federal, which Drilling Contractor may be required or deem it necessary to pay on account of employees of Subcontractor or its sub-subcontractors. Subcontractor agrees to furnish Drilling Contractor with the information required to enable it to make the necessary reports and to pay such taxes or charges. At its election, Drilling Contractor is authorized to deduct all sums so paid for such taxes and governmental charges from such amounts as may be or become due to Subcontractor hereunder.

(13) Subcontractor shall be an independent contractor with respect to the performance of all work hereunder, and neither Subcontractor nor anyone employed by Subcontractor shall be deemed for any purpose to be the employee,

agent, servant, or representative of Drilling Contractor in the performance of any work or service or part thereof in any manner dealt with hereunder. Drilling Contractor shall have no direction or control of the Subcontractor or its employees and agents except in the results to be obtained. The work contemplated herein shall meet the approval of Drilling Contractor and be subject to the general right of inspection for Drilling Contractor to secure the satisfactory completion thereof. The actual performance and superintendence of all work hereunder shall be by Subcontractor, but Drilling Contractor or its representatives shall have unlimited access to the operations to determine whether work is being performed by Subcontractor in accordance with all the provisions of this Contract and the work order.

(14) In addition to all other indemnifying provisions contained herein, Subcontractor represents and warrants that the use or construction of any and all tools and equipment furnished by Subcontractor and used in the work provided for herein does not infringe on any license or patent which has been issued or applied for, and Subcontractor agrees to indemnify and hold Drilling Contractor harmless from any and all claims, demands, and causes of action of every kind and character in favor of or made by patentee, licensee, or claimant of any right or priority to such tool or equipment, or the use or construction thereof, which may result from or arise out os furnishing or use of any such tool or equipment by Subcontractor in connection with the work under this Agreement and applicable work orders.

(15) In the event there is a conflict between the provisions hereof and any papers or documents, which may have been

executed or passed between the parties hereto in connection with the subject matter hereof, it is understood and agreed that the provisions hereof shall be controlling. It is expressly understood and agreed by the parties hereto that no provision of any delivery ticket, invoice or other instrument used by Subcontractor in setting forth the operations conducted hereunder shall supersede the provisions of this Agreement.

(16) Time is expressly declared to be the essence of this Contract. If either party hereto defaults in the performance of this Contract, or of work commenced under work orders as provided for herein, the other party has the option to terminate this Contract and the work order involved.

(17) No waiver by Drilling Contractor of any of the terms, provisions, or conditions hereof shall be effective unless said waiver shall be in writing and signed by an authorized representative of Drilling Contractor.

(18) All notices to be given with respect to this Contract and applicable work orders unless provided for shall be given to the Drilling Contractor and to the Subcontractor respectively at the addresses hereinabove shown. All sums payable hereunder to Subcontractor shall be payable at Drilling Contractor's address hereinabove shown unless otherwise specified herein or in the applicable work order.

(19) As a part of the consideration for this Agreement, Subcontractor hereby agrees that the provisions of paragraphs 8 (Waiver of Subrogation), 9 (Indemnity), 10 (Loss of Subcontractor's Equipment) and 14 (Patent Infringement) shall extend to and be enforceable by and for the benefit of any Owner or Operator for whom Drilling Contractor is per-

forming operations or services.

(20) The provisions hereof shall extend to and apply to situations where Ocean Drilling & Exploration Company is engaged in operations as a drilling contractor, as an operator, and as an owner or co-owner of oil and gas properties upon which the work contemplated hereunder is being performed.

(21) Except to the extent that this agreement may be exempt therefrom, Subcontractor agrees to comply with the provisions of 41 CFR Part GO-1 and Executive Order No. 11246.

During the performance of this contract, the sub-contractor (hereafter in this paragraph 21 referred to as "contractor") agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive considera-

tion for employment without regard to race, creed, color, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965,and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as other-

wise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24,1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

IN WITNESS WHEREOF, the parties hereto have executed this Contract upon the date above shown in several counterparts, each of which shall be considered as an original.

WITNESSES:
S/ D. R. Rando
S/ William P. Himel
S/ D. R. Rando

OCEAN DRILLING & EXPLORATION COMPANY
S/ Alde J. French
Drilling Contractor

H. B. "Buster" Hughes, Inc.
By: S/ Bobby Dagley - Vice Pres.
Subcontractor

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ISSUED TO

OCEAN DRILLING & EXPLORATION COMPANY

This is to certify that the Employers Insurance of Wausau

(Insurance Company) of Wausau, Wisconsin
(Home Office Address)

has issued the following insurance policies and that such policies are in full force and effect. Said insurance company agrees that in the event of any change being made in the policies which affects the interest of Ocean Drilling & Exploration Company or in the event said policies are cancelled, written notice will be given to Ocean Drilling & Exploration Company, P. O. Box 61780, New Orleans, La. 70160, thirty (30) days prior to the effective date thereof.

Name of Insured H. B. Buster Hughes, Inc.

Address P. O. Box 55, Harvey, Louisiana

Description of Work Oil Field Contractor

INSURANCE POLICIES IN FORCE

TYPE OF INSURANCE	LIMITS OF LIABILITY		POLICY NUMBER	EXPIRATION DATE
A. Workmen's Compensation	Statutory			
And Employers' Liability (Coverage B)	$ 500,000	each employee	1611-02-037529	11-1-71
	$ 500,000	each accident		
B. Comprehensive General Public Liability Bodily Injury	$ 300,000	each person	1621-03-037529	11-1-71
	$ 300,000	each accident		
Property Damage	$ 100,000	each accident		
	$ 300,000	aggregate		
C. Automobile Liability Bodily Injury	$ 300,000	each person	1621-04-037529	11-1-71
	$ 500,000	each accident		
Property Damage	$ 100,000	each accident		

D. Vessels Protection & Indemnity	$_____ each accident $_____ Max. deductible		
Hull	To value of vessel $_____ Max. deductible		
E. Excess Liability Details:	$_____ each accident		

Please answer the following questions regarding the policies listed above:

A. Workmen's Compensation and Employers' Liability:

1. Does this policy contain
   (a) U.S. Longshoremen's & Harbor Workers' Compensation Endorsement? (x) Yes ( ) No
   (b) Outer Continental Shelf Act Endorsement? (x) Yes ( ) No
   (c) Is Coverage "B" extended to cover the liability of the insured under the "Death On the High Seas Act" (x) Yes ( ) No
   (d) Is coverage afforded for Maintenance & Cure? (x) Yes ( ) No
   (e) Endorsement providing that a claim "in rem" shall be treated as a claim against the Contractor (x) Yes ( ) No

II. If Marine Coverage for employees is not provided herewith, state policy (ies) where coverage is provided:

_____

III. It is hereby certified that Workmen's Compensation policy is filed with the proper authorities in the State (s) of: Louisiana and Mississippi

_____

B. Comprehensive General Public Liability

I. Does policy cover
(a) Surface damage for blowout or explosion? (x) Yes ( ) No
(b) Contractors' Protective - work let or sublet (x) Yes ( ) No
(c) Products - Completed Operations (x) Yes ( ) No
(d) Contractual Liability specifically insuring contract between Ocean Drilling & Exploration Company and insured (x) Yes ( ) No
(e) Is coverage provided for property of others in your "care custody and control" ( ) Yes (x) No
(f) Endorsement providing that a claim "in rem" shall be treated as a claim against the insured (x) Yes ( ) No

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II. Territory Covered Louisiana, Mississippi and Outer Continental Shelf

(a) Has policy been endorsed to cover operations in Gulf of Mexico (x) Yes ( ) No
(b) If answer to (a) is "yes", up to how many miles offshore Territorial limits adjacent to U. S. and Canada

C. Automobile Liability

I. Does this policy cover:
(a) All owned automobiles (x) Yes ( ) No
(b) Non-owned automobiles (x) Yes ( ) No
(c) Hired automobiles (x) Yes ( ) No

D. Vessels

I. Does Hull insurance cover:
(a) Towing Vessels - American Institute Tug Form January, 1954 (Tug Syndicate Revision 11/30/59) or equivalent ( ) Yes ( ) No
(b) All other vessels - American Institute Time Hull Form December, 1959 ( ) Yes ( ) No

II. Does policy:
(a) Name Ocean Drilling & Exploration Company as an Assured on all Hull and P&I policies ( ) Yes ( ) No
(b) Delete clause limiting underwriter's liability with respect to an Assured other than an owner as respects to Ocean Drilling & Exploration Company ( ) Yes ( ) No
(c) Include crew members under the P&I insurance. ( ) Yes ( ) No

E. Has insurer waived subrogation against Ocean Drilling & Exploration Company in the above mentioned insurance policies, including all insurance carried by insured protecting against loss of or damage to its property and equipment employed in any of Ocean Drilling & Exploration Company's operations (x) Yes ( ) No

F. If Insured has contract with Ocean Drilling & Exploration Company containing "Hold Harmless" agreement, does policy cover such assumed liability? (x) Yes ( ) No

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Date 10-9-70 Employers Insurance of Wausau
(Name of Insurance Company)

Signed By _____ _____
(Authorized Representative) (Name of Agent)

6112 Hamburg St., New Orleans, Louisiana
(Address of Agent)

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